

III. Case Law Precedent Does Not Support the ACTA Petition Request for a Cease Order

The ACTA Petition relies upon the Supreme Court's decision in Southwestern, supra, to support its request for the Commission to "grant special relief to maintain the status quo." Although the scope of its request is unclear, it appears that the ACTA Petition requests that the Commission assert jurisdiction over IVSDs by issuing a freeze order against them. Specifically, the ACTA Petition states that the Commission "should take the same action" that it did in against certain cable operators in Southwestern "so that [the Commission] might carefully consider what rules to best protect the public interest and to carry out its statutory duties."⁴³

In Southwestern, the Court upheld the Commission's order that certain CATV operators cease the importation of Los Angeles-based broadcast television signals to the CATV operators' subscribers in San Diego during the pendency of a hearing. The Commission issued the order to restrict carriage of Los Angeles-based signals to areas then served by the local Los Angeles broadcasters during the pendency of hearings to determine whether the carriage of such signals outside of Los Angeles would have contravened the public interest. The scope of the Commission's order merely limited further

⁴³ ACTA Petition at 8-9.

expansion of the cable operators' expansion as it existed at the time of the issuance of the order. The Court in Southwestern held that the Commission had authority to issue a freeze pursuant to the Commission's authority under Section 4(i) of the Communications Act to issue "such orders, not inconsistent with this [Communications Act]." ⁴⁴

Southwestern and its progeny, therefore, support the principle that Section 4(i) does not provide the Commission with authority to take action that would be inconsistent with other provisions of the Communications Act. For example, in Son Broadcasting, Inc., ⁴⁵ the Commission considered whether Section 4(i) provided the agency with the authority to summarily grant an application under circumstances that would otherwise require an administrative hearing pursuant to Section 309. The Commission concluded that "[w]hile Sections 4(i) and (j) of the Act provide us with broad discretionary powers, they do not permit us to subvert the [Communications Act's] other provisions." ⁴⁶ Therefore, the Commission in Son Broadcasting denied the request to summarily grant the application pursuant to Section 4(i) and instead desig-

⁴⁴ Southwestern, 392 U.S. at 181 (citing Section 4(i) of the Communications Act, 47 U.S.C. § 154(i) (and secondarily, Section 303(r)).

⁴⁵ 88 FCC 2d 635 (1981).

⁴⁶ Id. at 639 (citations omitted).

nated the proceeding to an administrative hearing pursuant to Section 309.⁴⁷ Further, in AT&T v. FCC⁴⁸ the Court of Appeals for the Second Circuit noted that "in exercising authority pursuant to Sections 4(i), 4(j) or 403, the Commission's action must not be inconsistent" with another provision of the Communications Act.⁴⁹

Grant of ACTA's request would not only conflict with another provision of the Communications Act, but would be overly broad such that it would be meaningless. The ACTA Petition does not specify the scope of the freeze order that it requests the Commission to impose on IVSDs other than to request that the order "maintain the status quo."⁵⁰ Because IVSDs are in the business of developing software for national (and international) distribution, and not in the business of providing a Telecommunications Service, an order preserving the geographical status quo, even if within the Commission's authority, would be meaningless. Indeed, any broader order would necessarily conflict with the Internet-related protections contained in Section 230 of the

⁴⁷ Id. at 639-640.

⁴⁸ 487 F.2d 865 (2d Cir. 1973).

⁴⁹ Id. at 877. See FTC Communications, Inc. v. FCC, 750 F.2d 226, 232 (2d Cir. 1984). See also Lincoln Tel. & Tel. Co. v. FCC, 659 F.2d 1092 (D.C. Cir. 1981).

⁵⁰ ACTA Petition at 9.

Communications Act by, as discussed above, imposing stifling regulations over IVSDs. This inherent conflict with Section 230, therefore, eliminates the Commission's authority to grant special relief pursuant to Section 4(i).

In addition, such actions are likely to cause the breach of contracts between IVSDs and their distributors as well as result in litigation between the Commission, the distributors and the IVSDs. ACTA contends, however, that such action is necessary to ensure that the Commission "might carefully consider" what rules to adopt in a rule making -- a task the Commission admirably performs in hundreds of ongoing rule making proceedings without resorting to a freeze of each affected industry. In light of the great costs and risks and minimal benefits associated with the ACTA Petition's request, its conflict with Section 230, and its misplaced reliance on Southwestern, the Commission should reject both the requests for the cease order and the related request for rule making.⁵¹

⁵¹ The Commission can easily dismiss the issues raised by the ACTA Petition in its response thereto. Accordingly, there is no need to initiate a rule making proceeding.

IV. Miscellaneous Issues

A. IVSD Will Not Harm IXC's Nor Universal Service

The ACTA Petition argues that IVSDs unfairly harm IXC's by essentially enabling IVSD software users to obtain long distance services at prices lower than those offered by IXC's. There are two fundamental weaknesses to ACTA's argument. First, IXC's provide underlying infrastructure for the Internet and thereby derive profit from the Internet's increased usage generated by IVSD software users. Indeed, MCI is currently a carrier for 40% of the world's Internet traffic.⁵² Second, nothing restricts IXC's from also serving as Access Software Providers, and in fact both MCI and AT&T are Access Software Providers. Therefore, because IXC's profit from increased Internet traffic and nothing restricts IXC's from also serving as Access Software Providers, ACTA's argument that IVSD software and IVSDs are unfairly harming IXC's is without merit.

In addition, the ACTA Petition suggests that a deregulated Internet could harm universal service.⁵³ Section 254(d) of the Communications Act, however, limits Universal Service Fund ("USF") contributions to Telecommunications Carriers that provide interstate service, or any other providers

⁵² See Mike Mills, *MCI Offers Customers Free Internet Access*, Wash. Post, Mar. 19, 1996, at C1.

⁵³ See ACTA Petition at 9-10.

of interstate Telecommunications.⁵⁴ As discussed above, the Communications Act's definitions of Telecommunications Carriers and Telecommunications were clearly drafted by Congress to exclude IVSDs. Accordingly, as a matter of law (or policy), there is nothing untoward about IVSDs not contributing to the USF.⁵⁵ In fact, IXC's and other providers of interstate PSTN services will continue to contribute to the USF.⁵⁶

B. Commission Regulation of IVSDs is Not Necessary to Prevent Unlawful Communications

Finally, ACTA states that "[a]bsent action by the Commission, [IVSD software] could be used to circumvent restrictions traditionally found in tariffs concerning unlawful uses, such as gambling, obscenity, prostitution, drug traffic, and other illegal acts."⁵⁷ The ACTA's reliance on the Commission regulation to enforce such criminal laws is misplaced.

⁵⁴ 47 U.S.C. § 254(d).

⁵⁵ Similarly, CPE manufacturers and distributors do not contribute to the USF.

⁵⁶ In addition, as a practical matter, the potential for an adverse effect on the USF is de minimis considering the nascent stage of the IVSD software and the numerous less convenient and expensive prerequisites necessary to make the IVSD software function.

⁵⁷ ACTA Petition at 9-10.

Title 18 of the United States Code proscribes the illegal activities cited in the ACTA Petition.⁵⁸ These activities constitute criminal acts when executed by means involving, among other things, communications devices and facilities. The Department of Justice, however, rather than the Commission, is charged with enforcing the provisions of Title 18, and in fact the Commission is expressly prohibited from "enforcing" Section 223's anti-obscenity measures.⁵⁹ Accordingly, ACTA's claim that Commission regulation is necessary to prevent circumvention of restrictions concerning unlawful activities is wholly without merit.⁶⁰

⁵⁸ 18 U.S.C. §§ 1304, 1307, 1343, 1367, 1464, 1468, and 2510-2520.

⁵⁹ See 47 U.S.C. § 223(e)(6).

⁶⁰ In addition, ACTA provides no evidence for its contention that the Internet is a finite resource and therefore requires management by the Commission. ACTA Petition at 5. Indeed, unlike the radio spectrum, the Internet is not a finite resource. Accordingly, this argument by ACTA should be rejected by the Commission.

CONCLUSION

For the aforementioned reasons, VocalTec and Quarterdeck respectfully request that the Commission deny the ACTA Petition for declaratory ruling, special relief, and rule making.

Respectfully submitted by:

VOCALTEC LTD.
QUARTERDECK CORPORATION

By:



Antoinette Cook Bush

Richard A. Hindman

Marc S. Martin

SKADDEN, ARPS, SLATE, MEAGHER & FLOM
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000

Its Attorneys

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Certificate of Service

I, Kimberley E. Montanaro, do hereby certify that copies of the foregoing Joint Opposition were sent via hand delivery on Wednesday May 8, 1996 to the following:

Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

Commisioner James H. Quello
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, D.C. 20554

Commissioner Rachelle B. Chong
Federal Communications Commission
1919 M Street, N.W.
Room 844
Washington, D.C. 20554

Commisioner Susan Ness
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, D.C. 20554

William E. Kennard, Esq.
General Counsel
Office of General Counsel
Federal Communications Commission
1919 M Street, N.W.
Room 614
Washington, D.C. 20554

Regina Keeney, Esq.
Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 500
Washington, D.C. 20554


Robert M. Pepper, Chief
Office of Plans and Policy
Federal Communications Commission
1919 M Street, N.W.
Room 822
Washington, D.C. 20554

Wanda Harris
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 518
Washington, D.C. 20554

William F. Caton, Acting Secretary
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C., 20554

ITS, Inc.
2100 M Street, N.W.
Suite 140
Washington, D.C. 20037

Charles H. Helein, Esq.*
Helein & Associates, P.C.
8180 Greensboro Drive
Suite 700
McLean, VA 22102


Kimberley E. Montanaro

* Via first-class mail.